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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 551

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,
a Foreign Corporation,
Petitioner,
vs.
EUGENE LUDWIG, as Guardian of the Estate of
Richard Paul Zatek, a minor, Cause No. 21997;
TERESA SERRATONI, as Administratrix of the Estate of
Joan Ellen Zatek, Deceased, Cause No. 21998;
TERESA SERRATONI, as Administratrix of the Estate of
John Michael Zatek, Deceased, Cause No. 21999;
JOHN ZATEK and WOLVERINE INSURANCE CO.,
a Michigan Corporation, as Subrogee of
John Zatek, Cause No. 22025,
Respondents

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-QUESTIONS PRESENTED

I.

No constitutional rights were violated by the Court of Appeals' decision in judicially noting a commonly accepted fact which was not decisive of the case.

II.

The Court of Appeals' decision did not conflict with any other decisions of this Court or any other Court of Appeals, and was in harmony with Michigan law as well.

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COUNTER-STATEMENT OF FACTS

(Figures (a) and (b) refer to pages of Petitioner's Appendix and Respondents' Appendix, respectively, used in the Court below.)

Respondents do not accept petitioner's statement because it is distorted and overburdened with material which has no bearing here. This slanted presentation fails to

fairly advise the Court with any reasonable accuracy as to what is actually involved.

Inasmuch as this application for certiorari is directed to a ruling of the Court of Appeals, and is limited to the child passengers' cases *only*, a fair appraisal of the controlling facts perforce requires cognizance of the footing upon which these cases came there.

The trial judge having erroneously granted a motion for judgment n.o.v. and having set aside the verdicts of the jury in the cases brought on behalf of these children, they were entitled upon review to the benefit of that evidence which most favored upholding the verdicts upon such an appeal (cases cited at pg. 626, 333 F.2d 621).

Petitioner railroad has submitted to this Court a lengthy and unnecessarily detailed presentation of contradictory evidence, emphasizing proofs tending to favor the railroad, while omitting evidence favorable to the verdicts. The decision of the Court of Appeals clearly and properly notes that in *these* cases, the passenger children's, the evidence is not to be sifted and weighed under clear cut principles of applicable Michigan law. Having received verdicts from the jury they are entitled to the evidence most favoring their side of the case.

The Court of Appeals properly reviewed all of the evidence in deciding the driver's separate appeal, which stood on an entirely different basis there. However, the driver's case is not involved in this application for certiorari.

The Court of Appeals was confronted with the specific question in *these* cases of whether there was sufficient evidence and inferences therefrom for these passengers' cases to have been submitted to the jury and, after carefully reviewing the proofs supporting the jury verdicts and the applicable Michigan law, it held that there was. The spe-

cific claims of negligence under consideration were but two: excessive speed and improper lookout. The Court of Appeals found that there was sufficient evidence of petitioner's negligence on both scores, and petitioner does not here question the real merits of that decision.

These respondents were child passengers in a station wagon which became stalled, late on a sunny June afternoon on a through highway upon a level city crossing (41a, 49a, 51a, 78a). Their mother, the driver, kept making frantic efforts to start the vehicle which every eyewitness agreed was "bucking and jerking" (41a, 46a, 51a, 78a, 70b). One witness thought he saw puffs of exhaust smoke (49a). Under the only facts which were properly controlling before the Court of Appeals, those tending to favor upholding the verdicts, petitioner was running an unscheduled freight train through an industrial and race track area during congested rush hour traffic (33a, 36a, 38a, 50a, 67a, 90a, 73b) at an excessive rate of speed (120a, 126a) and its three man crew failed to make any attempt to stop its train after the automobile was stalled and visible on the tracks straight ahead of it for a carelessly long period, after allowing for reaction time (26a, 28a, 36a, 87a, 121a). Tragic deaths and permanent injuries to these infants ensued.

It had been possible during the trial to calculate the position of the onrushing train when the car was first seen stalled on the crossing (39a) from learning the timing sequence of the gates and flashers (60a, 61a, 117a), and every eye witness called by either side agreed that the woman driver (their mother) made continual desperate efforts to get the stalled car started (41a, 46a, 49a, 51a). She persisted in these frantic efforts to get the car started until practically the last few instants of her life, when she began waving furiously at the oncoming train (41a).

The respondents showed in their pleadings that the vehicle occupied by them became stalled on the crossing and this was denied by petitioner railroad. (Complaint, par. 9 (9a), realleged, amended complaint, par. 9 (18a), answer, par 9 (15a), readopted, answer to amended complaint, par. 2 (21a)). Some testimony was adduced on behalf of respondents as to the condition of the automobile (p. 805, p. 806, separate transcript filed herewith). Petitioner railroad offered absolutely no evidence whatever on the issue of the condition of the vehicle, nor as to the ability of this or any stalled car to be moved.

Respondents also proved that if the train brakes had been applied as soon as they should have been after the vehicle became stalled, under the evidence most favorable to them, that the entire collision might have been avoided by complete stoppage of the train *even if the stalled vehicle never budged* (86a, 87a, 118a, and calculations based thereon). Other expert opinion testimony showed that upon prompter braking the train might have been brought *almost* to a stop, and that timelier application of the brakes would then have resulted in some impact, but at greatly reduced force (125a). Under the evidence most favoring these children, calculations showed that the three man crew of petitioner's train carelessly failed to apply the brakes for a period of from 12 to as long as 37 seconds after the vehicle was first seen stalled on the tracks, following allowance for ordinary reaction time.

Actual train speed was disputed throughout the trial. Petitioner failed to even offer its speed tape, and eye witnesses and expert testimony variously fixed the train speed at a rate ranging as high as 67 plus miles per hour (120a, 126a). The railroad speed rule was in evidence; it forbade speeds there in excess of 60 miles per hour (56a).

At the conclusion of the trial the jury retired and rendered its verdicts against the driver, and in favor of these infant respondents (168a, 169a). Thereupon petitioner filed its motion for judgment notwithstanding the verdict which the trial judge erroneously allowed. Appellate review of his action followed, ordering the jury's decision in these cases reinstated.

When these cases were submitted to the jury, there were no claims made by respondents that petitioner was liable on any of the extraneous issues which it persistently mixes into its brief such as adequacy of crossing protections, whistle warnings and the like (176a).

ARGUMENT

I.

NO CONSTITUTIONAL RIGHTS WERE VIOLATED BY THE COURT OF APPEALS' DECISION IN JUDICIALLY NOTING A COMMONLY ACCEPTED FACT WHICH WAS NOT DECISIVE OF THE CASE.

The basic deception in petitioner's position here is that it wishes this Court to believe that the unanimous Court of Appeals decision *turned* upon taking judicial notice of a commonly known fact and that this action was the real *basis* for its reinstatement of the jury verdicts. Petitioner claims that the appellate tribunal reinstated these verdicts, reached at the conclusion of a 3½ week trial, without any foundation in the evidence because some "essential" or "necessary" element, missing from the proofs, was "supplied" by the Court of Appeals.

Going one step farther in this strange legal maneuver (for petitioner bitterly opposed the right of the jury to

decide the facts at every possible stage of this case) the petitioner also contends that this reinstatement of the jury's decision deprived petitioner of its right to present evidence to the jury. This is the real thrust of petitioner's claim, and that claim is wholly false.

In support of its request for intervention by this Court, the petitioner has presented a lengthy brief which is observed upon examination to revolve around one item only. It has torn a single sentence from its context, which it has taken from the middle of a paragraph contained in the appellate decision, and is attempting here to persuade this Court that it must have been in a different setting, that the entire case turned upon that point, that it was unjustified by the proofs and that petitioner was thereby deprived of its right to trial by jury! How deeply imbedded in its cheek petitioner's tongue was at the time these claims were imagined is not known.

All of what the court actually said when the challenged words were uttered should here be noted:

> "(10, 11) Any braking, of course, increased the crucial time interval available to the frantic efforts of the driver to escape. We take judicial notice of the fact that a modern automobile can be started and moved its own length in very few seconds. We also note that any movement of the automobile and any decrease of speed or force of the train—even if insufficient to have prevented impact—could have changed substantially both the nature of the accident and the nature of the injuries suffered therefrom." (333 F.2d 621, at 629.)

What *was* the context of this paragraph, and indeed the *entire appeal* in the children's cases?

The court had already found that there was ample evidence for the cases to go to the jury upon the issue of

speed, and was now considering whether there was sufficient evidence to warrant submission on the issue of careless maintenance of lookout. The court had just reviewed the evidence concerning that matter and the delay before any train brakes were applied.

The very paragraph from which the sentence was lifted by petitioner notes that, in addition to possible avoidance of this harm by starting up and moving the car, *other* means of preventing these deaths and injuries might well have been found by the *jury* to be probable results of timelier braking by petitioner's three-man crew.

From a purely logical point of view, since other effects of prompter braking than starting up the car could have avoided this disaster, it was not essential that the car be moved. The materially reduced force of impact and even the possibility of a complete, dead stop—without the car ever moving—in addition to the added escape time, were all inferences the *jury* had a right to find under the proofs in this case. Consequently it was unnecessary for the court to take judicial notice of that widely known fact, since moving the car was not the only possible way to avoid this tragedy and, in noting that particular possibility, the decision was merely *obiter dictum* and not decisive of the case.

The Court was really holding that there was enough evidence of causal connection between petitioner's careless failure to maintain a reasonably vigilant lookout and the resultant catastrophy for the jury, and not the judge, to decide the facts.

Moreover, petitioner railroad had a full opportunity during the trial to offer any evidence it might have had concerning the stalled vehicle's condition. As noted earlier the pleadings themselves made out an issue as to the con-

dition of the car, in that it was affirmatively alleged in the complaints that these children were occupying a vehicle which was stalled. The answer of petitioner expressly denied these allegations. They were of unquestionable relevance and consequently either side had a right to introduce testimony thereon.

In point of fact testimony *was* presented on behalf of respondents by Mr. John Zatek, the owner of the station wagon and father of these children, which was not printed in the appendices for the Court of Appeals by either party, since the issues there were confined to the reasons given by the trial judge for his rulings below. This testimony, contained on pages 805 and 806 of the record, has been filed herewith. In it, the owner of the vehicle gave testimony as to the fact that the brakes and tires were in good condition and that he had never encountered any unusual problems with the automobile. Obviously such testimony gave petitioner the right to impeach, rebut and contradict.

However the petitioner cannot point to any place in the record where it offered the least bit of evidence concerning the condition of this vehicle or the starting capabilities of any stalled vehicle at all. It offered none. It did not contradict Mr. Zatek's evidence on this point, even by cross-examination.

Furthermore, petitioner does not state that it has any relevant facts which should have been considered by the jury during the trial, or that it has discovered any new evidence.

In stating to this Court that it was deprived of any right to present evidence as to the facts concerning this or any stalled automobiles, the petitioner is misrepresenting to this Court.

Thus we have a picture of petitioner portraying the fact of which the appellate court took notice in passing as being decisive of the case, and yet the condition of the stalled vehicle was considered so unimportant by both parties that neither side printed that testimony for the Court of Appeals in the first instance. It would most certainly have been part of the appendix for respondents below if it could have been foreseen that the railroad would now claim that it was deprived of its right to present evidence as to the condition of the vehicle, but petitioner is making that claim here for the first time.

The evidence reveals that all of the witnesses on both sides of the case who were present at the scene of this tragic crash agreed that respondents' driver was continually trying to start the automobile. The Court of Appeals was actually considering whether the *jury* would have a right to infer from the evidence that there could have been a causal connection between the harm and the failure to apply the train's brakes as soon as petitioner's crew should have in the exercise of ordinary care, and it was in *that* setting, and in that setting only, that the appellate decision noted in effect that *one* of the possible salutary effects which the jury could have found might have resulted from prompter braking would have been the moving of the motor vehicle completely off the track. Whether stated in terms of "judicial notice" or not, the jury had a right under this evidence to make that inference as well as to infer that there were *other* ways by which this tragic disaster could have been averted, if there had been earlier efforts to stop the train. That is the proper context of the single sentence upon which petitioner claims deprivation of *constitutional* rights. The claim is specious and without merit.

ARGUMENT

II.

THE COURT OF APPEALS' DECISION DID NOT CONFLICT WITH ANY OTHER DECISIONS OF THIS COURT OR ANY OTHER COURT OF APPEALS, AND WAS IN HARMONY WITH MICHIGAN LAW AS WELL.

> "Judicial notice is taken of matters commonly and generally known with reference to automobiles and their operation." *20 Am. Jur.*, Ev., Sec. 124.

This principle is so well known in the law that it should hardly require any citation to this Court.

The plethora of cases from which a sentence or two has been reprinted by petitioner dealing with judicial notice are cases which are not in point here, for the reason that they were decisions in cases where the matter noticed was not at issue (See *Quong Wing v. Kirdendall*, 223 U.S. 59, and *Mountain View & Milling Co. v. McFadden*, 180 U.S. 533) or where the lower tribunal went outside the record and into undivulged sources of information (see for example, *Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio*, 301 U.S. 292 and *Alvary v. United States*, 302 F. 2d 790). Moreover, in some of the cases in which the limits of the rule were reprinted by petitioner, the Court actually *approved* taking judicial notice, see for example, *Brown v. Piper*, 91 U.S. 37.

This Court must not be unaware that in recent years numerous decisions have appeared from courts of last resort throughout this land taking judicial notice of stopping distances of automobiles and the number of feet per

second travelled by a moving object. An example of such ruling is *Perhaska v. Silberg,* 302 Mich. 47.

As the Supreme Court of Michigan has elsewhere said:

> "Courts are not required to close their eyes to facts obvious to the rest of mankind."
>
> *Bassey v. City of Huntington Woods, Michigan,* 344 Mich. 701.

Another decision holding that the jury may take notice of matters of common knowledge concerning the mechanical effect of various steps taken in the operation of an automobile, without explicit proof thereof is: *Oliver v. Bereano,* 293 N.Y. 931, 60 N.E. 2d, 134, affirming 48 NYS 2d, 142, 267 App. Div. 747.

Petitioner claims, without being able to cite a single case actually so holding (page 32, petition for writ of certiorari) that in taking judicial notice as it did in this case of a widely known and generally accepted fact, the Court of Appeals for the Sixth Circuit rendered a decision which conflicted with decisions of this Court, Michigan Law, and several other Courts of Appeals.

The Court of Appeals for the Eighth Circuit, in the case of *Mills v. Denver Tramway Corp.,* 155 F. 2d 808, also took judicial notice, *sua sponte* and without a request from either party to do so, of the truth of a commonly known fact for the first time on appeal. The Court there noted that whether judicial notice should be taken is largely within the discretion of the appellate court and the mere fact that the trial judge was not required by plaintiff to judicially notice the fact did not prevent the appellate court from noting on its *own* accord a truth which is a matter of common knowledge to all intelligent men.

No Court of Appeals decision in conflict with the decision of any other Court of Appeals on the same matter has been shown by petitioner, nor has any important state question been shown to have been decided in conflict with applicable state law, nor has any federal question been shown to have been decided in a way to conflict with applicable decisions of this Court in the application for certiorari.

Instead, a reading of the unanimous decision of the Court of Appeals for the Sixth Circuit, reaffirmed by the entire Court in denying the petition for rehearing (which raised the same points as are presented here), discloses that the decision appealed from was sound and in consonance with long respected principles of law. The ruling of the Court of Appeals was actually a vindication of the right of litigants to trial of issues of fact by the jury, and it properly set aside an erorneous ruling made by the trial judge when he invaded the province of the jury by taking it upon himself to decide factual matters. Although the decision appealed from may not be a landmark case, it is nevertheless an important bulwark in the protection of the right to trial by jury and does not stand for anything else, as petitioner would have the Court believe.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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